89-1553

Supreme Court, U.S.
FILED
FEB 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

No. _____

LINDA UNDERWOOD, Petitioner,

v.

SERVICEMEN'S GROUP INSURANCE, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

STEPHEN L. JOHNSTON
633 West Fifth North
P.O. Box 748
Salt Lake City, Utah 84110
Counselor for Petitioner

15 March 1990

QUESTION PRESENTED

Is a policy holder of Servicemen's Group Insurance entitled to an increase in insurance coverage mandated by Congress where the increase in coverage took place within 120 days after the policy holder was released from active duty and where Congress provided in 38 U.S.C. Section 767 that insurance shall continue (unless discontinued or reduced in writing) 120 days after separation from service?

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The decision of the Tenth Circuit Court is erroneous in that it adds a requirement that a policy holder be on active duty before he can participate in servicemen's group coverage increases. The decision of the United States District Court for the District of Utah ruled that no such active duty requirement exists in the statutory scheme and that petitioner is entitled to the increased coverage. Petitioner submits the District Court ruling to be the correct decision.

APPENDIX 15

Memorandum, Decision and Order of the United States District Court District of Utah - Central Division i

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Pertinent Text of Statues Involved in this Case
38 U.S.C. sec. 767
38 U.S.C. sec. 768 xxi

PARTIES TO PROCEEDINGS

The parties to this proceeding are set forth in the caption of this case.

The parties are Linda Underwood, Petitioner, and Servicemen's Group Insurance, Respondent.

TABLE OF AUTHORITIES

No case authority is cited in this petition. Cases will be cited by petitioner in her brief if the petition is granted.

STATUTES

38 USC sec. 767

38 USC sec. 768

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1989

LINDA UNDERWOOD, Petitioner

v.

SERVICEMEN'S GROUP INSURANCE CO., Respondent.

PETITION FOR A WRIT OF CERTIORARI

The petitioner, Linda Underwood requests a writ of Certiorari issue to review the judgement and opinion of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled proceeding on 23 December, 1989.

OPINIONS BELOW

The opinions in this case are not published yet. All opinions in this case of the United States District Court for Utah and the United States Court of Appeals, Tenth Circuit are contained in the appendix to this Petition.

JURISDICTION

1. This Court's jurisdiction is invoked pursuant to 28 United States Code, sec. 2101 and Rule 10, Rules of The Supreme Court.

2. The judgement of the Court of Appeals for the Tenth Circuit was entered on 23 December 1989.

3. There has been no order respecting a rehearing from the Tenth Circuit Court.

4. The United States District Court for the District of Utah had jurisdiction by virtue of Article III Section 2 United States Constitution and Title 28 United States Code in that the amount claimed was in excess of $10,000 and the fact that diversity of citizenship exists between Plaintiff (Petitioner) and Defendant.

STATUTES INVOLVED

1. The statutes involved in this case are:

38 USC sec. 767

38 USC sec. 768

2. The pertinent text of the statutes is set forth in the appendix to this Petition.

STATEMENT OF THE CASE

Plaintiff, Linda Underwood, is the spouse of James Edmond Underwood, Sergeant First Class, United States Army, now deceased. Plaintiff is the beneficiary under her deceased husband's serviceman's life insurance policy which was issued to the decedent pursuant to his status as a member of the Armed Forces of the United States and Title 38 of United States Code.

Plaintiff's decedent was honorably discharged form the United States Army for medical reasons (terminal cancer) on 18 November 1985. At the time of release from active duty Sergeant Underwood was awarded 100 percent medical disability.

On 1 January 1986 Congress increased the insurance against death on S.G.I. insurance from thirty-five thousand ($35,000.00) to

fifty thousand ($50,000.00) dollars. Title 38 U.S.C. Section 767A. Title 38 Section 768 U.S.C. provides that each policy of S.G.I. insurance shall continue on a member of the uniformed services 120 days after separation from active duty. Title 38 Section 768(A)(1) further provides that if the service member on the date of separation is totally disabled the S.G.I. insurance shall continue for one year after the date of separation.

On 30 January 1986 Sergeant Underwood died. Title 38 Section 767 provides that the insurance so provided:

> "(s)hall automatically insure against death in the amount of (amount designate by Congress) dollars unless such member elects in writing (A) not to be insured or (B) to be insured in the amount less that (amount designed by Congress) dollars." (Emphasis supplied)

Sergeant Underwood did not exercise either of these elections.

The policy of insurance on Sergeant Underwood

therefore continued in effect either 120 days or one year after Sergeant Underwood separated from the Army.

Plaintiff contends, and the District Court agreed with Plaintiff's contention, that the increase which became effective on 1 January 1986 applied to all policies and that since Sergeant Underwood was covered by a policy of insurance at the effective date of the increase and at the date of death Sergeant Underwood's coverage was fifty thousand ($50,000.00) dollars.

Since Plaintiff's husband was still insured by a policy of S.G.I. insurance and since Sergeant Underwood did not exercise a contrary election, the coverage under his policy of insurance was increased from thirty-five thousand ($35,000.00) dollars to fifty thousand ($50,000.00) dollars. Linda Underwood has been paid thirty-five thousand

($35,000.00) by Defendant. Linda Underwood is entitled to fifteen thousand ($15,000.00) dollars from Defendant which represents the difference between the thirty-five thousand ($35,000.00) paid and the fifty thousand ($50,000.00) dollars of coverage in Sergeant Underwood's policy of S.G.I. insurance.

REASON FOR GRANTING WRIT OF CERTIORARI

CONGRESS DID NOT INTEND THAT A POLICY HOLDER BE ON ACTIVE DUTY AS A CONDITION TO RECEIVING AN INCREASE IN POLICY COVERAGE.

THE DECISION OF THE TENTH CIRCUIT COURT OF APPEALS PERTAINED TO AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH HAS NOT BEEN, BUT SHOULD BE SETTLED BY THIS COURT.

The ruling of the United States Court of Appeals for the Tenth Circuit that a service member must be on active duty in order to participate in an increase in servicemen's group insurance is a requirement which Congress did not include in the statutes which pertain to servicemen's group coverage.

Congress did not intend that a policy holder be on active duty in order for increased benefits to accrue. If a person is a policy holder the increase applies to his policy of S.G.I. insurance.

The litigants and other policy holders and prospective policy holders need a decision from this court which provides guidance to them with regard to servicemen's coverage.

CONCLUSION

The decision of the Tenth Circuit Court is erroneous in that it adds a requirement that a policy holder be on active duty before he can participate in servicemen's group coverage increases. The decision of the United States District Court for the District of Utah ruled that no such active duty requirement exists in the statutory scheme and that petitioner is entitled to the increased coverage. Petitioner submits the District Court ruling to be the correct decision.

Respectfully submitted,

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APPENDIX

Memorandum, Decision and Order of the United States District Court District of Utah - Central Division

Judgement of the United States District Court District of Utah - Central Division

Decision of the United States Court of Appeals Tenth Circuit

Pertinent Text of Statues Involved in this Case

38 U.S.C. sec. 767

38 U.S.C. sec. 768

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH - CENTRAL DIVISION

LINDA UNDERWOOD,

Plaintiff,

v.

SERVICEMEN'S GROUP INSURANCE,

Defendant.

MEMORANDUM DECISION AND ORDER

Civil No. C87-0361G

This matter came on for hearing on December 17, 1987, on defendant's Motion for Reconsideration of denial of Motion for Summary Judgement, and on defendant's objection to entry of judgement in favor of plaintiff. Plaintiff was represented by Stephen L. Johnston, and defendant was represented by Richard B. Ferrari. Both parties submitted memorandums, and presented oral argument. In addition, defendant submitted supplemental matters after

argument. The case was taken under advisement. The court being fully advised, it is hereby

ORDERED, that defendant's Motion for Reconsideration be, and the same hereby is, denied, and objections to judgement in accordance with this court's Memorandum Decision and Order of October 6, 1987, are overruled for the reasons set forth therein. Defendant insists that failure to pay the increased premium would render it inequitable and unfair to require payment of the increased coverage. However, it is clear that no payment of premiums even as to the original coverage is required during the period the policy remains in force after separation from the Army. Porter v. Prudential Insurance Company of America, 470 F. Supp. 203 (W.D. Tex. 1979). Defendant has urged that Regulations by the Veterans Administration applicable to prior similar legislation had the effect of excluding

members separated from service from receiving increased coverage in prior years when the statute in question was amended to provide increased coverage.[1] However, since no such regulation has been enacted as to the currently effective 1985 amendment, this court is neither guided by the past regulations nor influenced by a negative amendment. In all events, we know of no clear legislative intent to exclude such separated servicemen. In essence, this court reiterates its prior holding that since plaintiff's decedent had already qualified

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[1] 38 C.F.R. Section 9.4, states in pertinent part:

> Effective December 1, 1981 [the effective date of the amendment of 38 U.S.C. Section 767, increasing available coverage from $20,000], Servicemen's Group Life Insurance is issued in the amount of $35,000 unless the insured member elects not to be insured. . . . The $35,000 coverage does not apply to members separated or released prior to December 1, 1981 except for those members eligible for coverage under Section 9.1(a)(3).

for coverage, and died after separation from the service while such coverage was in full force and effect, he was automatically entitled by operation of law to benefit from the increase enacted by Congress.

Judgement is entered herewith accordingly.

DATED: December 29, 1987.

/s/J. Thomas Greene/s/

J. THOMAS GREENE
UNITED STATES DISTRICT JUDGE

COPIES TO:
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Richard B. Ferrari, Esq.

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Salt Lake City, UT 84110
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UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

LINDA UNDERWOOD, Plaintiff, vs. SERVICEMAN'S GROUP INSURANCE, Defendant.	JUDGEMENT Case No. 87-C-0361G Judge J. Thomas Greene

The above entitled matter came to the attention of the Court on 23 September 1987 pursuant to Defendant's Motion to Dismiss Plaintiff's Complaint. Linda Underwood, Plaintiff, was represented by Stephen L. Johnston, Esq. Defendant, Serviceman's Group Insurance, was represented by Richard B. Ferrari, Esq. The parties having previously submitted memoranda, presented oral argument, following which the Court took the matter

under advisement.

The Court, having examined the memoranda and papers on file and having listened to and considered oral arguments and being thereby fully advised, entered a memorandum decision and order denying Defendant's motion to dismiss and directing Plaintiff to prepare a judgement granting Plaintiff's claim for the additional $15,000.00 insurance coverage.

Plaintiff prepared and submitted a form of judgement. Defendant filed and served a motion and memorandum in support thereof requesting the Court reconsider its order denying Defendant's motion of summary judgement. Plaintiff submitted and served additional memoranda in opposition to the reconsideration motion.

The motion for reconsideration was argued by counsel for the parties at a hearing before Judge J. Thomas Greene held pursuant to notice on 17 November 1987.

The Court, having reexamined the memoranda

and papers on file and considered oral arguments, entered its memorandum decision and order which denied Defendant's motion for reconsideration and Defendant's objections to judgement and entered judgement accordingly. The memorandum, decision and order was entered by the Court on 29 December 1987.

Based upon the foregoing, the Court does hereby enter judgement in favor of Plaintiff and against Defendant as follows:

1. Judgement is hereby entered in favor of Plaintiff Linda Underwood against Defendant Servicemen's Group Life Insurance in the sum of Fifteen Thousand Dollars ($15,000.00).

Dated this _____ day of _____ 1988.

BY THE COURT:

_____

J. Thomas Greene
United States District Judge

MAILING CERTIFICATE

I certify that a true and correct copy of the foregoing JUDGEMENT was mailed to:

Richard B. Ferrari, Esq.
310 South Main #1200
Salt Lake City, UT 84101

Linda Underwood
341 West 100 North
Circle #1C
American Fork, UT 83003

U.S. District Court
Judge J. Thomas Greene
350 South Main
Salt Lake City, UT 84101

Dated this 19th day of January 1988.

/s/M. Nelson/s/

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

LINDA UNDERWOOD, Plaintiff-Appellee, vs. SERVICEMAN'S GROUP INSURANCE, Defendant-Appellant.	No. 88-1319

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH
(D.C. No. 87-0361-G)

Richard B. Ferrari (Carolyn Cox with him on the brief), of Watkiss & Campbell, Salt Lake City, Utah, for Defendant-Appellant.

Stephen L. Johnston, Salt Lake City, Utah, for Plaintiff-Appellee.

Before BALDOCK, BRORBY, and EBEL, Circuit Judges.

PER CURIAM.

This appeal is taken from a judgement of

the United States District Court for the District of Utah determining that plaintiff was entitled to an additional $15,000 in insurance proceeds from the defendant. The amount represents an increase in coverage authorized by Congress after Plaintiff's husband was discharged from the United States Army but before he died.

The facts are undisputed. Plaintiff's husband was a member of the Untied States Army, insured under a Servicemen's Group Life Insurance policy as described in 38 U.S.C. § 765, et seq. Sergeant Underwood was discharged on November 18, 1985, as one hundred percent disabled. As of that date, the insurance policy limitation was $35,000. 38 U.S.C. § 767(a) (1981).

On December 3, 1985, Congress amended the statute to increase the policy amount to $50,000. The effective date of that amendment (with a specific exception explained infra) was January 1, 1986.

Sergeant Underwood, whose policy continued in effect for one year after his separation from the service, 38 U.S.C. § 768(a)(1)(A), died on January 30, 1986.

Defendant paid Plaintiff the $35,000 in April of 1986, and she then filed this action claiming entitlement to $15,000, the difference between the $35,000 paid and the $50,000 provided for in the 1985 amendment. Servicemen's Group Insurance defended the claim on the ground that the statute entitling members of the uniformed service on active duty to $50,000 in life insurance coverage instead of the previous $35,000 did not apply to Plaintiff's decedent because he was not on active duty at the time the policy increase became effective. The district court found that the increase in coverage inures to the benefit of a policy holder who holds a policy when the increase becomes effective, whether or not that insured remains eligible to be issued a policy. We

disagree and reverse.

The district court's interpretation of the statutory provisions 38 U.S.C. § 765, et seq., is a question of law, subject to de novo review by this court. Marshall v. El Paso Natural Gas Co., 874 F.2d 1373, 1382 (10th Cir. 1989); E.E.O.C. v. Cherokee Nation, 871 F.2d 937, 938 n.1 (10th Cir 1989).

As initially enacted in 1965, the statute provided for $10,000 in insurance coverage to members of the armed services. Since then, Congress has amended the statute on several occasions for a number of reasons. In 1970, 1974, 1981, and 1985 the amount of insurance available to service personnel was increased to $15,000, $20,000, $35,000 and $50,000, respectively. Insurance coverage is effective the first day of active duty "or the date certified by the [Veteran's Administration] Administrator to the Secretary concerned as the date Servicemen's

Group Life Insurance or group concerned takes effect, whichever is the later date." 38 U.S.C. § 767(a)(1986).

Pursuant to this section of the statute, the Administrator has promulgated (and amended) corresponding regulations governing the effective date of the increases in insurance coverage. 38 C.F.R § 9.4 (1988).

For example, accompanying the 1970 increase, the Administrator revised 38 C.F.R. § 9.4 to read that each member of the armed forces "on duty on or after June 25, 1970, is automatically insured against death in the amount of $15,000 ..." 36 Fed. Reg. 3838, 3809 (February 27, 1971). The June 25, 1970 date is the enactment date of the amendment increasing the amount of coverage from $10,000 to $15,000.

Similarly, the regulations were amended in January of 1975 to reflect the 1974 increase to $20,000. Section 9.4 was changed to provide that "[e]ffective May 24, 1974,

Servicemen's Group Life Insurance is issued in the amount of $20,000 ..." 40 Fed. Reg. 4135, 4137 (January 28, 1975). Again, the May 24, 1974 date is the effective date of the 1974 amendments to the statute.

The effective date of the 1981 increase in coverage (to $35,000) was December 1, 1981. Pub. L. No. 97-66, 95 Stat. 1026, 1037 (approved October 17, 1981). The corresponding amendments to the regulations, however, specifically provided that "[t]he $35,000 coverage does not apply to those members separated or released prior to December 1, 1981 ..." 38 C.F.R. § 9.4 (1987). See 48 Fed. Reg. 8069, 8070 (February 25, 1983). Finally, the December, 1985, amendment increasing coverage to $50,000 lists the effective date as January 1, 1986. Pub. L. No. 99-166, 99 Stat. 941, 957 (approved December 3, 1985). Again the accompanying regulation provides that the $50,000 coverage "does not apply to those

members separated or released prior to January 1, 1986 ..." 38 C.F.R § 9.4 (1988); 53 Fed. Reg. 17,698 (May 18, 1988).

The Administrator published the 1983 and 1988 regulations as final, without opportunity for public comment, because the amendments "merely reflect statutory changes in the law" and therefore providing for public comment would have no effect on the changes mandated by Congress. 48 Fed. Reg. 8069 (February 25, 1983); 53 Fed. Reg. 17,698 (May 18, 1988). It therefore appears that, in the Administrator's view, the amendments to the regulations were clear and presumably not subject to misinterpretation.

The language of 38 U.S.C § 767(a) reads as follows:

> (a) Any policy of insurance purchased by the Administrator under section 766 of this title shall automatically insure against death --
>
> > (1) any member of a uniformed service on active duty, active duty for training, or inactive duty training scheduled in advance by competent authority;

> (2) any member of the Ready Reserve of a uniformed service who meets the qualifications set forth in section 765(5)(B) of this title; and
>
> (3) any member assigned to, or who upon application would be eligible for assignment to, and Retired Reserve of a uniformed service who meets the qualifications set forth in section 765(5)(C) of this title;
>
> in the amount of $50,000 unless such member elects in writing (A) not to be insured under this subchapter, or (B) to be insured in an amount less than $50,000 that is evenly divisible by $10,000. The insurance shall be effective the first day of active duty or active duty for training, or the beginning of a period of inactive duty training scheduled in advance by competent authority, or the first day a member of the Ready Reserve meets the qualifications set forth in section 765(5)(B) of this title, or the first day a member of the Reserves, whether or not assigned to the Retired Reserve of a uniformed service, meets the qualifications of section 765(5)(C) of this title, or the date certified by the Administrator to the Secretary concerned as the date Servicemen's Group Life Insurance under this subchapter for the class or group concerned takes effect, whichever is the later date.

We cannot read this language to mean anything other than that the increased policy coverage inures to the benefit only of those

people who are "member[s] of a uniformed service on active duty" and is effective either on the first day of active duty or the date certified by the Administrator as the date that the life insurance class or group takes effect, whichever is later. The district court read this language as referring only to the member's eligibility to receive a policy and determined that once the policy is in effect, the individual is entitled to whatever increased coverage Congress provides.

However, the language simply does not say eligibility but refers to automatic insurance under the policy. James Underwood's policy was for $35,000. Nothing in the intervening Congressional action changes the coverage of an already issued policy. Indeed, the language of the statute has no effect on an individual who is no longer in active service and who is insured under a previously issued policy at the lower level.

Certainly, had Congress intended the increases to apply retroactivity to former service members still covered by their policies under 38 U.S.C. § 768(a)(1)(1988), it could have so stated when the 1985 amendments were made. And indeed, by a later amendment (approved December 28, 1985), Congress specifically extended the $50,000 coverage to members who died after December 12, 1985, but before January 1, 1986. Pub. L. 99-227, § 3 (December 28, 1985), 99 Stat. 1745, 1746.

We conclude that the proviso that the $50,000 coverage does not apply to members of a uniformed service separated before January 1, 1986, means exactly what it says, i.e., that in order to qualify for the increased amount, Sergeant Underwood had to have been on active duty as of January 1, which he was not. We further see no reason to depart from the analysis of Garvey v. Servicemen's Group Life Insurance, 584 F. Supp. 623, 625 (M.D.

Pa. 1984)(Congress only intended to cover under increase those qualifying members), which research indicates is the only other decision on the subject.[1]

In denying defendant's motion for reconsideration of its earlier ruling in plaintiff's favor, the district court noted and apparently relied on the fact that as of December of 1987 there existed no regulation specifying that the $50,000 coverage did not apply to those members separated prior to January 1, 1986. Indeed, not until several months later did the Administrator finally promulgate the change to 38 C.F.R. § 9.4 covering the 1985 statutory amendment. We note that the change in the regulation accompanying the October 17, 1981, amendment

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[1] In Garvey, the court held that the 1981 amendment increase in coverage was not applicable to plaintiff's decedent, who had been transferred from the Ready Reserve of the United States Navy as not physically qualified prior to the effective date of the increase.

to 38 U.S.C. § 767(a)(increasing the amount of coverage from $20,000 to $35,000) was not adopted until February 25, 1983. 38 C.F.R. § 9.4 (1987)($35,000 coverage does not apply to members separated prior to December 1, 1981). It appears the Administrator simply has not been prompt in promulgating these regulations.

Because Sergeant Underwood was not on active duty at the time the increase in insurance from $35,000 to $50,000 became effective, his beneficiary is only entitled to the $35,000.

REVERSED.

PERTINENT TEXT OF STATUES INVOLVED IN THIS CASE

38 USC sec. 767. Persons insured; amount

"(a) Any policy, of insurance purchased by the Administrator under section 766 of the title shall automatically insure against death -

(1) any member of a uniformed service on active duty, active duty for training, or inactive duty training scheduled in advance by competent authority ... in the amount of [$50,000] unless such member elects in writing (A) not to be insured under this subchapter ..."

38 USC sec. 768. Duration and termination of coverage; conversion

"(a) Each policy purchased under this subchapter shall contain a provision, in terms approved by the Administrator, to the effect that any insurance thereunder on any member of the uniformed services, ... (and) shall continue ...

(A) one hundred and twenty days after the

separation or release from active duty ... unless on the date of such separation or release the member is totally disabled, ... in which event the insurance shall cease one year after the date of separation..."

CERTIFICATE OF MAILING

I hereby certify that on this 15th March 1990, copies of a Petition for Writ of Certiorari were mailed, postage prepaid, to the following:

40 copies — Clerk of the United States
Supreme Court
1 First Street NE
Washington, DC 20543

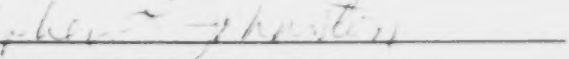
Along with a check of $300.00 to cover the filing fee.

3 copies — Richard B. Ferrari, Esq.
350 West Ash #750
San Diego, California 92101

1 copy — Linda Underwood (Colton)
5972 West 9960 North
Highland, Utah 84003

I further certify that all parties required to be served have been served.

Stephen L. Johnston



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